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## Elever Johnson and Irene Johnson, his wife v. Dr. Joseph Keith, M. D., et al

Petition for Rehearing 1974-SC-0777

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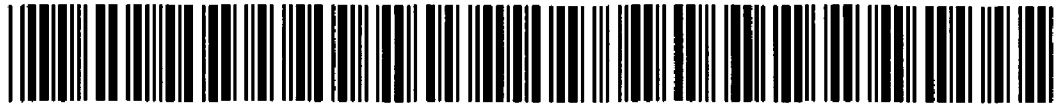
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**KYSC1974-SC-0777-01**

[D2A69D1B-0A03-4A68-AD04-96B59458E028]

{134943}{54-130315:083549}{033076}

# **PETITION FOR REHEARING**

3481

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# SUPREME COURT OF KENTUCKY

FILE NO. 74-777

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ELEVER JOHNSON AND IRENE  
JOHNSON, HIS WIFE ..... APPELLANTS

V.

DR. JOSEPH KEITH, M. D., ET AL ..... APPELLEES

---

APPEAL FROM FAYETTE CIRCUIT COURT  
HON. L. T. GRANT, JUDGE

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## PETITION FOR REHEARING

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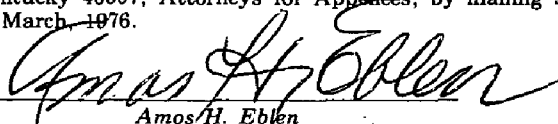
MAR 30 1976

MARTIN LANE COLLINS  
CLERK  
SUPREME COURT

AMOS H. EBLEN  
300 The Lexington Building  
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*Attorneys for Appellants*

This is to certify that a true copy of the foregoing Petition for Rehearing has been served upon Hon. L. T. Grant, Judge of the Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507 and upon the Hon. R. David Clark, First National Bank Building, Lexington, Kentucky 40507, and Landrum, Patterson & Dickey, Security Trust Building, Lexington, Kentucky 40507, Attorneys for Appellees; by mailing same this 27 day of March, 1976.

  
Amos H. Eblen  
Attorney for Appellants

# **SUPREME COURT OF KENTUCKY**

**FILE NO. 74-777**

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**ELEVER JOHNSON AND IRENE  
JOHNSON, HIS WIFE ..... APPELLANTS**

**V.**

**DR. JOSEPH KEITH, M. D., ET AL ..... APPELLEES**

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**APPEAL FROM FAYETTE CIRCUIT COURT  
HON. L. T. GRANT, JUDGE**

---

## **PETITION FOR REHEARING**

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**MAY IT PLEASE THE COURT:**

The first sentence of the two sentence Per Curiam Opinion rendered on March 5, 1976, is accepted as expressing the true reason for not considering the question of the failure of Good Samaritan Hospital to have the usual records of the myleogram performed on the plaintiff, Elever Johnson. The reason stated is that the failure to keep proper records was not presented below and therefore will not be considered here. In the light of what appears in two places in the record on appeal, to which we shall make reference, we submit that

this statement is not correct and we are at a loss to understand how anyone who has examined this record could be so wrong.

First, attention is directed to the Transcript of Evidence, Vol. V, page 655 to and including page 664. There the absence of the proper and usual records was argued pro and con by counsel for plaintiffs and counsel for the hospital. Counsel for the plaintiffs pointed to the fact that without records there was no way of knowing what radiopaque material was used, how much was extracted and the doctor or doctors who did the myelography. In the light of the finding of the jury that Dr. Keith and Dr. Travis did not perform the myelogram, the absence of the required record deprived the plaintiffs of the identity of the doctor or doctors who did the myelogram. All of the foregoing is from the Transcript of Evidence, Vol. V, p. 655 to and including page 664.

After the trial and the finding of the jury that Dr. Keith and Dr. Travis did not do the myelogram the devastating effect of the absence of records was no longer a possible source of harm to the plaintiffs — it had become an established fact. With that in mind the plaintiffs filed a motion and grounds for a new trial. This appears on pages 597 and 598 of the Transcript of Record. For the convenience of this Court the following portion of that motion is as follows:

"1. The Court erred in granting the motion of the defendant, Good Samaritan Hospital, to dismiss the actions as to it. In support hereof, plaintiffs state that KRS 216.450(23) required the defendant, Good Samaritan Hospital, to keep adequate and complete written records on the plaintiff, Elever Johnson, during his stay in the hospital and the evidence conclusively established the violation of this duty. KRS 446.070 declares that, 'A person injured by the violation of any statute may recover by reason of the violation, although a penalty or forfeiture is imposed for such violation.' As a result of the lack of adequate records and the verdict of the jury, the cause of action of each plaintiff has been rendered null and void."

In response to that motion and other motions of the plaintiffs the lower court rendered a written opinion, dated March 11, 1974, and the following is taken from that opinion:

"The first ground alleged by the plaintiffs in that the court erred in granting the motion of the defendant, Good Samaritan Hospital, to dismiss the action as to it. This issue has been argued before the court on numerous occasions and there is no need to go into detail regarding this ground. The court does not feel that there is any causal relationship between the alleged failure of the defendant, Good Samaritan Hospital, to keep records and the injury sustained by the plaintiff, Elever Johnson, in the form of

alleged continuous headaches. We do not feel that this ground has any merit insofar as the motion for a new trial is concerned."

This opinion of the lower court is on pages 619 to and including 621 of the Transcript of Record.

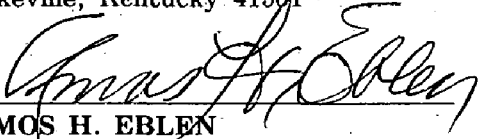
Note the second sentence in the quoted portion of the opinion, "This issue has been argued before the court on numerous occasions and there is no need to go into detail regarding this ground". How could any issue have been argued before the court on numerous occasions and still not be presented below? Matters presented in a motion and grounds for a new trial are reviewable on appeal. *Cornett v. Wilder*, Ky., 307 S.W.2d 752, even though there can be no appeal from an order overruling a motion for a new trial. Surely, the first sentence of the Per Curiam was not intended to mean that an argument presented in the Brief filed by the Appellants was not presented below. It was presented below and the statutes in point were cited to the court so that it be considered by the court. This should mean that this question was preserved for appellate review. See Clay, Ky. Practice, Vol. 7, Comment 2 under Rule 59.06.

We submit that the matter of the hospital's failure to keep records was presented to and considered by the lower court and that this question was properly preserved for review by this court. We

believe that a consideration of the question of the failure of the hospital to keep records will cause this court to reverse the judgment as to the hospital and should lead this court to give a much more thoughtful review to the question of due diligence on the part of the plaintiffs as to the newly discovered evidence.

Respectfully submitted,

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# **A P P E N D I X**

RENDERED: MARCH 5, 1976

**SUPREME COURT OF KENTUCKY**

FILE NO. 74-777

ELEVER JOHNSON AND IRENE  
JOHNSON, HIS WIFE                      APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT  
V. HONORABLE L. T. GRANT, JUDGE  
CIVIL ACTION NO. 30966

DR. JOSEPH KEITH, M. D.,  
ET AL APPELLEES

**MEMORANDUM OPINION PER CURIAM**

## AFFIRMING

The theory that the hospital should be held liable because it did not keep proper records was not presented below and therefore will not be considered here.

This court is not persuaded that the trial court erred in its holding that the appellants had not exercised due diligence to discover the alleged newly discovered evidence.

The judgment is affirmed.

All concur.

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